



## **S. 2644 — THE SPECIAL COUNSEL INDEPENDENCE AND INTEGRITY ACT — Is CONSTITUTIONAL**

***Restricting the President’s ability to remove the Special Counsel and/or giving the judiciary the power to review such a removal is constitutional.***

The binding Supreme Court precedent in Morrison v. Olson, 487 U.S. 654 (1988), upheld a similar provision in the Ethics in Government Act of 1978 restricting the Attorney General’s power to remove the independent counsel except for good cause. The Court found that the Act did not impermissibly interfere with the President’s exercise of his constitutionally appointed functions or violate the separation of powers.

***Courts have long held that Congress may place restrictions on the President’s ability to remove inferior officers.***

The Special Counsel is an inferior officer appointed not by the President, but by the Attorney General (or, in this case, the Deputy Attorney General). In the case of inferior officers, Congress may “limit and restrict the power of removal as it deems best for the public interest.” United States v. Perkins, 116 U.S. 483, 485 (1886), cited with approval in Myers v. United States, 272 U.S. 52, 161–163, 164 (1926), and Morrison v. Olson, 487 U.S. 654, 689 n.27 (1988). See also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483, 495 (2010).

***S. 2644 does not impermissibly interfere with the President’s ability to fulfill his executive function.***

Under the Constitution, the executive function does not include the power to act for corrupt purposes. Rather, the President must take care that the laws be faithfully executed and may not attempt to execute them in bad faith or with a corrupt intent. The Supreme Court has held in a line of cases going back to Humphrey’s Executor v. United States in 1935 that its primary concern with Congressional restrictions on the executive removal power is interference with the President’s ability to carry out the executive function. Thus, limiting the President’s ability to remove a Special Counsel except for good cause does not impair the President’s ability to faithfully execute the laws. It only limits his ability to act upon bad faith motivations, which are necessarily not part of his executive power and are therefore not protected from intrusion by Congress.